Bank Industri & Teknologi Malaysia Bhd v Alom Building Systems Sdn Bhd

HIGH COURT (KUCHING) — COMPANIES WINDING UP NO 28–13 OF 2004–I

CLEMENT SKINNER J

4 MAY 2006

Companies and Corporations — Winding up — Petition — Who may present petition — Whether only judgment creditor may present petition — Whether contingent or prospective creditor of company may present a petition to wind up – Companies Act 1965 s 217(b)

Companies and Corporations — Winding up — Procedure — Substitution of petitioner — Whether person who wished to be substituted as petitioning creditor must show that he had right to present petition at the time when original petition was presented — Whether order of substitution could be made orally — Whether person applying to be substituted as the petitioner should have first issued a statutory notice under s 218 (2)(a)

Companies and Corporations — Winding up — Service of petition — Whether must be made at registered office and not at business address — Whether irregularity of service may be cured

Bank Industri dan Teknologi (M) Bhd ('Bank Industri'), a creditor of the respondent had applied orally to be substituted as the petitioner in the hearing of the respondent's winding up petition. The substitution was allowed and the petition was re-served on the respondent. The respondent then applied to set aside the order of substitution and to set aside the service on it of the amended petition.

The respondent submitted that Bank Industri was not a judgment creditor as it only obtained its judgment against the respondent on 1 February 2005 which was a date well after the date on which the original winding up proceedings commenced. It was next contended by the respondent that procedurally, the application for substitution ought to have been made by way of summons in chambers supported by an affidavit because rr 5 and 7 of the Companies Winding Up Rules 1972 ('the Rules') provides that all applications to court shall be made by summons or motion and shall be served on every person against whom an order is sought not less than two days before the date of hearing. The respondent said this was not done in this case. The respondent also submitted that the service on it of the amended petition was not effected on it at its registered office as required by r 25(1) of the Rules. According to the respondent it was only if it did not have a registered office that service may be effected on it at its business address.

Held, dismissing the respondent's applications:

(1) The person applying for substitution must be a person who would have had the right to present a petition at the time the original petition was presented. Therefore the person who wishes to be substituted as a petitioning creditor must show that at that date he would have had a right to present the petition (see para 9).

(2) It is not only a 'judgment creditor' who may present a winding up petition against a company. Section 217(b) of the Companies Act 1965 ('the Act') makes it very clear that any creditor, including a contingent or prospective creditor of the company may present a petition to wind up a company. Here, Bank Industri was clearly a creditor of the respondent. By 31 July 2004, the respondent was already indebted to it for RM906,898 under the facility agreement dated 23 May 2001. Further by 20 October 2004, Bank Industri had already filed a writ of summons against the respondent claiming the repayment of the liquidated amount of RM906,898. There was no evidence that the debt was genuinely disputed on substantial grounds. Accordingly, at the date when the petition was originally presented, Bank Industri was a person coming within the meaning of a creditor in s 217(b) of the Act, and in any event it was a contingent and prospective creditor of the respondent. So there was no reason why Bank Industri would not have had a right to present the petition on the date it was originally presented (see para 13); *Morgan Guaranty Trust Co of NY v Lian Seng Properties Sdn Bhd* [1989] 3 MLJ 172 distinguished.

(3) The critical question for decision before the court was whether Bank Industri was the person who 'would have a right to present the petition'. As far as the order of substitution was concerned, there was no requirement in r 33 of the Rules that a person applying to be substituted as the petitioner should have first issued a statutory notice under s 218 (2)(a) of the Act. To insist upon Bank Industri doing so would be to read into r 33(1) a provision, which was not there (see para 21); *Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals* [2001] 4 MLJ187 followed and *Lindeteves-Jacoberg (Malaya) Sdn Bhd v Electrical Switchgears Automation (M) Sdn Bhd* [1999] 5 MLJ 530 distinguished. The issuance of a s 218 notice is not a *sine qua non* for the presentation of a winding up petition (see para 25).

(4) Whether an application for substitution may be made orally or should be made by way of a summons in chambers will depend on the circumstances in which the application is made. In the circumstances in which the application for substitution came to be made in this case, an oral application was proper and sufficient (see para 28).

(5) Although the respondent said its registered office was situated in Selangor Darul Ehsan, when it entered into the Facility Agreement it declared that it was 'a company incorporated in Malaysia under the Companies Act 1965 and having its business address at Lot 1198, Block 12, Samajaya Free Industrial Trade Zone, Jalan Muara Tabuan, 93450 Kuching, Sarawak'. Since the respondent had a place of business within the local jurisdiction of the High Court Kuching, s 23(1)(b) of the Courts of Judicature Act 1964 conferred jurisdiction on this court to hear this petition (see para 38).

(6) Since the respondent did have a registered office, Bank Industri in effecting service of the amended petition on the respondent at its business address instead of at its registered address was not complying with r 25(1) of the Rules which gave rise to an irregularity regarding service (see para 42). However, this was a suitable case to apply r 194 of the rules by curing the irregularity by an appropriate order regarding costs (see para 48).

[Bahasa Malaysia summary

Bank Industri dan Teknologi (M) Bhd ('Bank Industri'), pemiutang responden telah memohon secara lisan untuk digantikan sebagai pempetisyen dalam perbicaraan petisyen penggulungan responden. Penggantian itu telah dibenarkan dan petisyen itu telah disampaikan semula ke atas responden. Responden kemudian telah memohon untuk mengetepikan perintah penggantian itu dan untuk mengetepikan penyampaian ke atasnya petisyen yang dipinda itu.

Responden berhujah bahawa Bank Industri bukan pemiutang penghakiman kerana ia hanya memperoleh penghakimannya terhadap responden pada 1 Februari 2005 yang merupakan tarikh selepas tarikh yang mana prosiding penggulungan asal dimulakan. Seterusnya dihujahkan oleh responden bahawa secara prosedur, permohonan untuk penggantian hendaklah dibuat melalui saman dalam kamar disokong oleh afidavit kerana kk 5 dan 7 Kaedah-Kaedah Penggulungan Syarikat 1972 ('Kaedah tersebut') memperuntukkan agar semua permohonan ke mahkamah hendaklah dibuat melalui saman atau usul dan hendaklah disampaikan kepada setiap orang terhadap satu perintah yang dipohon itu tidak kurang daripada dua hari sebelum tarikh perbicaraan. Responden mengatakan bahawa ini tidak dibuat sedemikian dalam kes ini. Responden juga berhujah bahawa penyampaian petisyen yang dipinda ke atasnya tidak sampai ke pejabat berdaftarnya seperti yang dikehendaki oleh k 25(1) Kaedah tersebut. Menurut responden hanya jika ia tidak mempunyai pejabat berdaftar maka penyampaian boleh dilakukan ke atasnya ke alamat perniagaannya.

Diputuskan, menolak permohonan-permohonan responden:

(1) Seseorang yang memohon penggantian hendaklah merupakan seseorang yang mempunyai hak untuk mengemukakan petisyen pada masa petisyen asal dikemukakan. Oleh itu seseorang yang berhasrat untuk digantikan sebagai pemiutang yang membuat petisyen hendaklah menunjukkan bahawa pada tarikh tersebut berliau mempunyai hak untuk mengemukakan petisyen itu (lihat perenggan 9).

(2) Bukan hanya 'judgment creditor' yang boleh mengemukakan satu petisyen penggulungan terhadap sebuah syarikat. Seksyen 217(b) Akta Syarikat 1965 ('Akta tersebut') adalah jelas bahawa mana-mana pemiutang, termasuklah pemiutang masa depan atau bakal pemiutang syarikat boleh mengemukakan satu petisyen untuk menggulung satu syarikat. Di sini, Bank Industri jelas pemiutang kepada responden. Sebelum 31 Julai 2004, responden telahpun berhutang kepadanya untuk jumlah RM906,898 di bawah Perjanjian kemudahan bertarikh 23 Mei 2001. Dan pada 20 Oktober 2004,

Bank Industri telahpun memfailkan satu writ saman terhadap responden menuntut bayaran balik jumlah boleh kira sejumlah RM906,898. Tiada keterangan menunjukkan hutang itu dipertikaikan atas alasan yang substantif. Oleh demikian, pada tarikh apabila petisyen itu dikemukakan pada asalnya, Bank Industri terangkum di bawah maksud pemiutang dalam s 217(b) Akta tersebut, dan dalam apa keadaan ia merupakan pemiutang masa depan atau bakal pemiutang responden. Oleh itu tiada alasan kenapa Bank Industri tidak mempunyai hak untuk mengemukakan petisyen pada tarikh ia dikemukakan pada asalnya (lihat perenggan 13); *Morgan Guaranty Trust Co of NY v Lian Seng Properties Sdn Bhd* [1989] 3 MLJ 172 dibeza.

(3) Soalan penting untuk diputuskan di hadapan mahkamah adalah sama ada Bank Industri merupakan seseorang yang 'would have a right to present the petition'. Setakat mana perintah penggantian adalah berkaitan, tidak ada keperluan dalam k 33 Kaedah tersebut untuk seseorang yang memohon untuk digantikan sebagai pempetisyen hendaklah pertamanya mengeluarkan satu notis statutori di bawah s 218(2)(a) Akta tersebut. Untuk mendesak Bank Industri berbuat demikian hendaklah dibaca k 33(1) sebuah peruntukan, yang tiada di situ (lihat perenggan 21); *Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals* [2001] 4 MLJ187 diikut dan *Lindeteves-Jacoberg (Malaya) Sdn Bhd v Electrical Switchgears Automation (M) Sdn Bhd* [1999] 5 MLJ 530 dibeza. Pengeluaran satu notis s 218 bukan satu *sine qua non* untuk mengemukakan satu petisyen penggulungan (lihat perenggan 25).

(4) Sama ada satu permohonan untuk penggantian boleh dibuat secara lisan atau hendaklah dibuat melalui saman dalam kamar bergantung kepada keadaan mana permohonan itu dibuat. Dalam keadaan mana permohonan untuk penggantian dibuat dalam kes ini, satu permohonan secara lisan adalah betul dan memadai (lihat perenggan 28).

(5) Meskipun responden mengatakan pejabat berdaftarnya terletak di Selangor Darul Ehsan, apabila ia memasuki perjanjian kemudahan ia mengisytiharkan bahawa ia merupakan 'a company incorporated in Malaysia under the Companies Act 1965 and having its business address at Lot 1198, Block 12, Samajaya Free Industrial Trade Zone, Jalan Muara Tabuan, 93450 Kuching, Sarawak'. Memandangkan responden mempunyai tempat perniagaan dalam bidang kuasa tempatan Mahkamah Kuching, s 23(1)(b) Akta Mahkamah Kehakiman 1964 memberikan bidang kuasa kepada mahkamah ini untuk mendengar petisyen ini (lihat perenggan 38)

(6) Memandangkan responden mempunyai pejabat berdaftar, Bank Industri dalam menyampaikan petisyen yang dipinda ke atas responden di alamat perniagaannya dan bukan ke alamat berdaftarnya tidak mematuhi k 25(1) Kaedah tersebut yang menimbulkan satu luar aturan berhubung penyampaian (lihat perenggan 42). Bagaimanapun, ini merupakan satu kes yang sesuai untuk menggunakan k 196 Kaedah tersebut dengan membetulkan luar aturan itu dengan memberikan perintah yang sesuai berhubung kos (lihat perenggan 48).]

Notes

For cases on petition for winding up, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1152–1219.

For cases on procedures for winding up, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1263–1264.

For cases on service of petition, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1300–1301.

Cases referred to

Ann Joo Metal Sdn Bhd v Pembenaan MY Chahaya Sdn Bhd [2000] 5 MLJ 709 (refd)
Dayasar Corp Sdn Bhd v CP Ng & Co Sdn Bhd [1990] 1 MLJ 191 (refd)
Jurupakat Sdn Bhd v Kumpulan Good Earth (1973) Sdn Bhd [1988] 3 MLJ 49 (refd)
Lindeteves-Jacoberg (Malaya) Sdn Bhd v Electrical Switchgears Automation (M) Sdn Bhd [1999] 5 MLJ 530 (distd)
Lympne Investments LTD, Re [1972] 2 All ER 385 (refd)
MUI Bank Bhd v Golden Hornbill Hotel Sdn Bhd [1993] 1 MLJ 290 (refd)
Mann & Anor v Goldstein & Anor [1968] 2 All ER 769 (refd)
Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals [2001] 4 MLJ187 (folld)
Mark Jaya Engineering Sdn Bhd v LFY Construction Sdn Bhd [1990] 1 MLJ 372 (refd)
Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd [1991] 1 MLJ 95 (distd)
Taylors Industrial Flooring Ltd v Matt Plant Hire (Manchester) Ltd [1990] BCLC 216 (refd)
Teck Yow Brothers Hand-Bag Trading Company v Maharani Supermarket Sdn Bhd [1989] 1 MLJ 101 (refd)

Legislation referred to

Companies Act 1965 ss 217(b), 218(2)(a), 219(2)
Companies Winding Up Rules 1972 rr 5, 7, 25(1), 33, 194
Courts of Judicature Act 1964 s 23

Albert Tang (Chew Jugah Wan Ullok & Co) for the substituted petitioner.
Daisy Tham (Tham & Co) for the respondent.
SY Chan (Ee & Lim Advocates) for the creditor RHB.
Suriyati Ismail for the Director-General of Insolvency.

Clement Skinner J:

[1] When this winding up petition was called on for hearing on 16 March 2005 the original petitioning creditor HSBC Bank Malaysia Bhd applied to withdraw the petition on the ground that it had been fully paid the amount due to it. The respondent company did not appear at the hearing even though it had been served with notice of hearing. On the court being informed of HSBC bank's intention, a creditor who was present, namely, Bank Industri & Teknologi Malaysia Bhd ('Bank Industri') and who had filed a notice of intention to appear on the

hearing of the petition and to support it, applied orally to be substituted as the petitioner. Pursuant to r 33 of the Companies Winding Up Rules 1972 ('the Rules'), I allowed the substitution on the following terms:

(a) the substituted petitioner file an amended petition within 14 days of the order of substitution;

(b) that the amended petition be re-served on the respondent and re- advertised in the newspapers in accordance with the Rules;

(c) the petition be heard on 16 June 2005.

[2] Subsequently, the time to file the amended petition was extended to 15 April 2005.

[3] On the amended petition being re-served on it, the respondent filed two applications, namely (i) to set aside the order of substitution; and (ii) to set aside the service on it of the amended petition.

[4] The respondent applied to set aside the order of substitution on the following grounds:

(1) the substituted petitioner did not have the right to present the petition at the time the order of substitution was made on 10.3.2005 or at the time the petition was originally presented or at the time the amended petition was filed or at all;

(2) no statutory notice pursuant to s 218(2)(a) of the Companies Act 1965 was served on the respondent by the substituted petitioner;

(3) the order of substitution was made irregularly as the substituted petitioner's application for the same failed to comply with rr 5 and 7 of the Rules;

(4) this court has no jurisdiction to hear the petition as the respondent's registered office is in West Malaysia.

[5] The respondent applied to set aside the service on it of the amended petition on the ground that service was not effected on it in accordance with r 25(1) of the Rules.

[6] I will now consider the merits of the two applications before me.

CAN BANK INDUSTRI BE SUBSTITUTED AS PETITIONER?

[7] It was the respondent's contention that Bank Industri had no right to apply for substitution on 10 March 2005 because at the date of the commencement of the original winding up proceedings, which was on 10 November 2004, Bank Industri was not a judgment creditor as it only obtained its judgment against the respondent on 1 February 2005 which is a date well after the date on which the original winding up proceedings commenced. Accordingly, the respondent contended that Bank Industri would not have had the right to present its petition at the time the original

petition was presented and so was not entitled to be substituted as a petitioner under r 33 of the Rules. In support the case *Morgan Guarantee Trust Co of NY v Lian Seng Properties Sdn Bhd* [1989] 3 MLJ 172 (HC) was cited.

[8] In my judgment, the question whether Bank Industri was properly substituted as the petitioner in this case will depend on whether it has satisfied the requirements of r 33(1) of the Rules. That sub-rule reads:

> 33 Substitution of any person as petitioner
>
> (1) When a petitioner is not entitled to present a petition or, whether so entitled or not, where he —
>
> (a) fails to take all the steps prescribed by these Rules preliminary to the hearing of the petition;
>
> (b) consents to withdraw his petition or allow it to be dismissed or the hearing to be adjourned;
>
> (c) fails to appear in support of his petition when it is called on in court on the day originally fixed for the hearing thereof or any day to which the hearing has been adjourned or if appearing does not apply for an order in terms of the prayer in his petition,
>
> the court may upon such terms as it thinks just substitute as petitioner any person who, in the opinion of the court, *would have a right to present the petition* and who is desirous of proceeding with the petition. (Emphasis added.)

In my judgment for the court to exercise the discretion which it has to order a substitution under the rule, it must be satisfied that the person who seeks to be substituted is a person who 'would have a right to present the petition'.

[9] So, was Bank Industri a person who would have a right to present the petition in this case? In considering this question, I accept the preposition made by both Mr Albert Tang of counsel for the substituted petitioner and Ms Daisy Tham of counsel for the respondent, that the words 'would have a right to present the petition' refer to a right to present the particular petition at the time it was presented, and not at the date the substitution is ordered. Put in another way, the person applying for substitution must be a person who would have had the right to present a petition at the time the original petition was presented. To me that represents the correct position because if a winding up order is eventually granted, the order relates back to the date when the petition was first presented because s 219(2) of the Act stipulates that 'winding up will be deemed to have commenced at the time of the presentation of the petition for the winding up'. Therefore, the person who wishes to be substituted as a petitioning creditor must show that at that date he would have had a right to present the petition.

[10] In the context of winding up proceedings, I also accept the proposition that a person is not a creditor of another when the debt is genuinely disputed on substantial ground (see *Re Lympne Investments LTD* [1972] 2 All ER 385 at p 389), thereby depriving him of the right to present a petition (see *Mann & Anor v Goldstein & Anor* [1968] 2 All ER 769).

[11] Reverting to the question whether Bank Industri had a right to present the petition on the date it was originally presented, the following chronology of events (revealed in the affidavits and exhibits filed by the parties in this application) are relevant:

23.05.2001
Facility Agreement signed between Bank Industri and respondent for Term Loan of RM1 million.

31.07.2004
respondent indebted to Bank Industri by RM906,898.00.

30.08.2004
Letter of demand sent to respondent requiring payment of RM906,898.00 within seven days thereof.

20.10.2004
Writ of summons issued by Bank Industri against respondent.

10.11.2004
Petition presented by HSBC Bank Malaysia Berhad.

1.02.2005
Judgment in Default sealed against respondent.

10.03.2005
Order of substitution granted.

[12] It will next be convenient to ascertain who in law may present a petition to wind up a company. In this regard, s 217 of the Companies Act 1965 ('the Act') provides:

217 Application to wind up

(1) *A company whether or not it is being wound up voluntarily may be wound up under an order of the court on the petition of —*

(a) *the company;*

(b) *any creditor, including a contingent or prospective creditor of the company;*

(c) *a contributory or any person who is the personal representative of a deceased contributory or the trustee in bankruptcy or the Official Assignee of the state of a bankrupt contributory;*

(d) *the liquidator;*

(e) *the Minister pursuant to section 205 or on the ground specified in section 218(1)(d);*

(f) *in the case of a company which is a licenced institution, or a scheduled institution in respect of which the Minister charged with responsibility for finance has made an order under section 24(1) of the Banking and Financial Institutions act 1989, or & non- scheduled institution in respect of which such Minister has made an order under section 93(1) of that Act, Bank Negara Malaysia;*

(g) *in the case of a company which is licenced under the Insurance Act 1996, Bank Negara Malaysia;*

A (h) *the Registrar on the ground specified in section 218(1)(m)or(n),*

or any two or more of those parties.

B **[13]** The respondent says that since Bank Industri only obtained its judgment on 1 February 2005, it would not have had a right as such 'judgment creditor' to present its petition on 10 November 2004 which was the date the original petition was presented. I do not agree. It is not only a 'judgment creditor' who may present a winding up petition against a company. Section 217(b) of the Act makes it very clear that any creditor, including a contingent or prospective creditor of the company may present a petition to wind up a company. Here, it is my view that Bank Industri was C clearly a creditor of the respondent. By 31 July 2004, the respondent was already indebted to it for RM906,898 under the facility agreement dated 23 May 2001. Further by 20 October 2004, Bank Industri had already filed a writ of summons against the respondent claiming the repayment of the liquidated amount of RM906,898. There is no evidence that the debt was genuinely disputed on substantial grounds. Accordingly, at the date when the petition was originally D presented, Bank Industri was, in my view, a person coming within the meaning of a creditor in s 217(b) of the Act, and in any event it was a contingent and prospective creditor of the respondent. So there was no reason why Bank Industri would not have had a right to present the petition on the date it was originally presented.

E **[14]** With regard to the case of *Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95 which was relied on by the respondent, I find that case distinguishable. First the debt there only crystallised well after the commencement of the winding up petition. VC George J (as he then was) said at p 175:

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> The crystallisation that KSY relies on could only come about when the agreed 18 month period was completed, which was well after the date of presentation of the petition.

[15] Secondly, the respondent in that case had a substantial cross-claim against the G creditor which had yet to be tried. The learned judge there took the view that the petitioner there could not be recognised as a supporting creditor by applying the principle that where a company has a substantial cross claim against the creditor which had yet to be tried, the petitioning creditor would have to wait till the cross claim is tried before it can petition to wind up the respondent. Thirdly, the basis upon which the decision in that case was arrived at is summarised in the following H passage at p 177 of that judgment:

> Accordingly, as the two judgments on which KSY initially founded its right to be a supporting creditor have turned out to be not on a sound basis and as the right to the agreed sum had not crystallised prior to the date of the presentation of the petition herein and in any event as the debtor has a substantial cross-claim against KSY in my judgment KSY I cannot be recognised as a supporting creditor.

[16] The facts here are clearly different where the debt in the present case crystallised before the original petition was presented. As at 31 July 2004, the respondent was already indebted to Bank Industri. In fact, Bank Industri had

already issued a writ for the amount payable to it, before the original petition was filed on 10 November 2004. Bank Industri clearly did so as a creditor of the respondent. Besides, unlike in *Morgan Guaranty* there is no cross claim involved in this. Further, the debt in this case has not been disputed and neither has there been any attempt to set aside the default judgment in this case.

[17] Ms Tham also referred me to *Jurupakat Sdn Bhd v Kumpulan Good Earth (1973) Sdn Bhd* [1988] 3 MLJ 49 where Zakaria Yatim J (as he then was) struck out a winding up petition on the ground that the petitioning creditor had no locus standi to present the petition because it was not a creditor since on the facts of that case, the respondent company was able to show that the alleged debt was seriously disputed on substantial grounds.

[18] I do not find that case of any assistance here where the question whether Bank Industri is a creditor arises in the context of an application for substitution and where the respondent in coming forward to set aside the order of substitution does not do so on the basis that the debt is seriously disputed on substantial grounds.

[19] It was next argued by the respondent that the facts which are relied upon by the substituted petitioner as forming the basis of its application for substitution must have existed at the date of commencement of the original winding up petition, and not subsequently, as was the case here, as according to the respondent, the substituted petitioner only obtained its judgment against the respondent on 1 February 2005, which was well after the order of substitution was granted. I see nothing in this point. I agree with Mr Tang of counsel for the substituted petitioner that this is a non issue given that the facts which formed the basis of the substituted petitioner's application were already in existence prior to the presentation of the original winding up petition.

NO STATUTORY NOTICE SERVED PURSUANT TO S 218(2)(a) OF THE ACT?

[20] It was contended by the respondent that in para 8 of the amended petition, the substituted petitioner relies on a presumption of inability of the respondent to pay its debts as the ground on which it seeks to wind up the respondent. However, according to the respondent, such a presumption can only arise in one way, that is, pursuant to s 218(2)(a) of the Act, by neglecting to pay a debt after service of the statutory notice mentioned in the section.

[21] I find no substance in this contention. The critical question for decision before the court is whether Bank Industri is the person who 'would have a right to present the petition'. The court is not at the present moment concerned with the circumstances in which a company may be wound up by the court, which is a matter covered by s 218 of the Act and which is a matter which the court must address at the hearing of the substantive application for winding up. As far as the order of substitution is concerned, there is no requirement in rule 33 of the Rules that a person applying to be substituted as the petitioner should have first issued a statutory notice under s 218(2)(a) of the Act. I agree with Mr Tang that to insist upon Bank Industri doing so, would be to read into r 33(1) a provision, which is not there.

[22] I was also referred by Mr Tang to the case of *Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals* [2001] 4 MLJ187 where the Court of Appeal (per Gopal Sri Ram JCA) said that while a winding up petition is normally based on the inability of a company to pay its debts as and when they fall due and that such inability is normally evidenced by the company's inability to satisfy or compound a notice of demand issued pursuant to s 218 of the Act, yet the issuance of a statutory notice under s 218 of the Act is not a *sine qua non* for the presentation of a winding up petition. According to the Court of Appeal, what was needed is compelling evidence of the company's inability to pay its debts as and when they fall due. In *Maril-Rionebel*, the Court of Appeal referred to two cases in support of its view, namely, *Teck Yow Brothers Hand-Bag Trading Company v Maharani Supermarket Sdn Bhd* [1989] 1 MLJ 101 and *Taylors Industrial Flooring Ltd v Matt Plant Hire (Manchester) Ltd* [1990] BCLC 216. The Court of Appeal pointed out that in *Taylors*' case the winding up petition was presented and prosecuted despite the absence of a notice under the English equipollent of s 218 of our Act. The rationale behind not issuing such a notice is given in the judgment of Dillon LJ at p 219 of the report where he said:

> There is no requirement that a creditor must serve a statutory demand. The practice for a long time has been that the vast majority of creditors who seek to petition for the winding up of companies do not serve statutory demands. The practical reason for that is that if a statutory demand is served, three weeks have to pass until a winding up petition can be presented. If, after the petition has been presented, a winding up order is made, the winding up is only treated as commencing at the date of the presentation of the petition; thus, if the creditor takes the course of serving a statutory demand, it would be giving the company an extra three weeks' grace in which such assets of the company may have, may be dissipated in attempting to keep an insolvent business afloat, or may be absorbed into the security of a debenture holder bank. So there are practical reasons for not allowing extra time, particularly where commercial conditions and competition require promptness in the payment of companies" debts so that the creditor companies can manage their own cash flow and keep their own costs down.

[23] I respectfully agree with what was stated by the court in *Maril-Rionebel* and *Taylors*' case.

[24] Ms Tham of counsel for the respondent referred me to the case of *Lindeteves-Jacoberg (Malaya) Sdn Bhd v Electrical Switchgears Automation (M) Sdn Bhd* [1989] 5 MLJ 530. That case also concerned an application to substitute a petitioning creditor. It was refused. In doing so Abdul Aziz J (as he then was) held that where an intending petitioner depends on the presumption under s 218(2)(a) as proof of the debtor company's inability to pay its debts, the petitioner would have no case to bring until the presumption has arisen after the statutory notice has been issued and served and the company has for three weeks failed to satisfy the demand of the statutory notice. The learned judge said at p 531:

> Until the presumption arises, the intending petitioner would have no cause of action to be qualified to present a petition. It must follow that he would have no cause of action to qualify to be substituted as a petitioner under r 33(1).

[25] I find that case distinguishable. In that case counsel for the intended petitioner informed the court that he relied solely on a presumption of the respondent's inability to pay its debts as the basis for substitution, but the intended petitioner had not yet issued its statutory notice under s 218 of the Act at the time the application for substitution. That is not the case here, where Bank Industri says it is a creditor within the meaning of s 217(b), for the reasons discussed earlier. Quite apart from what I have said, the decision of the Court of Appeal in the *Maril-Rionebel* case shows that the issuance of a s 218 notice is not a *sine qua non* for the presentation of a winding up petition.

ORAL APPLICATION FOR SUBSTITUTION PROCEDURALLY INCORRECT?

[26] It was next contended by the respondent that procedurally, the application for substitution ought to have been made by way of summons in chambers supported by an affidavit because rr 5 and 7 of the Rules provides that all applications to court shall be made by summons or motion and shall be served on every person against whom an order is sought not less than two days before the date of hearing. The respondent says this was not done in this case. The respondent further said that it did not even know that Bank Industri intended to appear at the hearing of the petition to support it, as it had not been served with a copy of the notice of intention to appear.

[27] The respondent further complained that since the order of substitution was obtained in its absence and without any prior notice given to it, the order was obtained in breach of the rules of natural justice and was highly irregular. According to the respondent, the irregularity was fundamental and not curable as the effect of the breach and non-compliance with the rules was to defeat its substantive rights. Accordingly, the respondent contended that the order of substitution should be set aside *ex debito justitiae*. I see absolutely no merit in these contentions.

[28] In the first place, the rules should be interpreted in a sensible way so as to result in fairness to the parties. In my judgment, whether an application for substitution may be made orally or should be made by way of a summons in chambers will depend on the circumstances in which the application is made. If a petitioning creditor negotiates to be paid by the debtor behind the back of other creditors and then applies to withdraw the petition on the day the petition is called on for hearing, I do not see any good reason why a creditor who has given notice of intention to appear cannot immediately apply orally for substitution in the course of the hearing. Indeed if a company owes money to several creditors but to stave off a winding up order it pays off the petitioning creditor, it would be unjust to allow a withdrawal of the petition in such circumstances. On the other hand, where a substitution is sought in less pressing circumstances, such as for example, that the petitioning creditor has delayed in prosecuting the petition, then it is reasonable to expect an application for substitution to be made by way of summons-in-chambers. Accordingly, it is my view that there can be no hard and fast rule on the mode of the application for substitution. In the circumstances in which the application for substitution came to be made in this case, I find that an oral application was proper and sufficient.

[29] Ms Tham referred me to the case of *Mark Jaya Engineering Sdn Bhd v LFY Construction Sdn Bhd* [1990] 1 MLJ 372 where Abu Mansor J (as he then was) refused an oral application for substitution because on the facts in that case, it would not have been just to do so. The learned judge observed in that case that if substitution was allowed, 'the first judgment creditor would be able thereby to short circuit the whole of the procedures incumbent on a petitioner to adhere to and comply with before a winding up order could be made and had'.

[30] However, I do not find that a 'short circuit of the whole procedures' has occurred here by the oral application for substitution because the order for substitution was granted on terms which require the substituted petitioner to file an amended petition and re-serve it before it is heard.

[31] With regard to the respondent's complaint that it did not even know that Bank Industri had given notice of intention to appear to support the petition, I see nothing in this complaint. The rules do not require such notice to be served on the respondent.

[32] With regard to the respondent's complaint that there has been an alleged breach of the rules of natural justice as it was not afforded a right to be heard on Bank Industri's application for substitution, I find the respondent's complaint misconceived. The respondent was served with the notice of hearing of the petition. If the respondent had wished to be heard on any matter that might arise at the hearing, it should have been present (through its counsel) at the date appointed for hearing the petition. If the respondent had done so it would have had an opportunity to be heard on application for substitution. It lies ill in the mouth of the respondent to complain of not being afforded an opportunity to be heard when it was not even bothered to appear on the date appointed for the hearing of the petition.

[33] Be that as it may, when I allowed Bank Industri's application for substitution, I did so on the terms earlier mentioned. By ordering that the petition be amended and re-served on the respondent before it is heard, the respondent was effectively given an opportunity, not only to be heard on the substantive petition for winding up, but also to apply to set aside the order of substitution. Accordingly I find the respondent has no cause to complain on this ground.

HAS THE HIGH COURT IN SABAH AND SARAWAK JURISDICTION TO HEAR THIS PETITION, AND FORUM NON CONVENIENS?

[34] It was contended by the respondent that since its registered office is situated in Selangor Darul Ehsan, it is resident there and therefore within the local jurisdiction of the High Court of Malaya and not that of the High Court of Sabah & Sarawak. That being the case, jurisdiction to hear this petition lies with the High Court of Malaya, not with this court.

[35] Alternatively, the respondent submitted that the High Court of Malaya is the forum of convenience. The respondent says this is so because in winding up

proceedings, close supervision is required by the court and the Director-General of Insolvency (DGI). According to the respondent such close supervision can only be effectively done by the court and the branch of the DGI within the locality of the registered office of the respondent. So the respondent says it would not be feasible for the High Court in Kuching or the DGPs branch office at Kuching to undertake these responsibilities. In support the case of *Dayasar Corp Sdn Bhd v CP Ng & Co Sdn Bhd* [1990] 1 MLJ 191 was cited.

[36] I see nothing in the points taken. As far as jurisdiction is concerned, s 23 of the Courts of Judicature Act 1964 ('the CJA') states that:

> Civil jurisdiction — general
>
> (1) Subject to the limitations contained in Article 128 of the Constitution the High court shall have jurisdiction to try all civil proceedings where —
>
> (a) the cause of action arose;
>
> (b) the defendant or one of several defendants resides or has his place of business;
>
> (c) the facts on which the proceedings are based exist or are alleged to have occurred; or
>
> (d) any land the ownership of which is disputed is situated,
>
> within the local jurisdiction of the court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.
>
> (2) Without prejudice to the generality of subsection (1), the High Court shall have such jurisdiction as was vested in it immediately prior to Malaysia Day and such other jurisdiction as may be vested in it by any written law in force within its local jurisdiction'.

[37] It is well accepted that subsections (a) to (d) of s 23 of the CJA are to be construed disjunctively.

[38] Although the respondent says its registered office is situated in Selangor Darul Ehsan, when it entered into the facility agreement it declared that it is 'a company incorporated in Malaysia under the Companies Act 1965 and having its business address at Lot 1198, Block 12, Samajaya Free Industrial Trade Zone, Jalan Muara Tabuan, 93450 Kuching, Sarawak'. Since the respondent has a place of business within the local jurisdiction of the High Court Kuching, s 23(1)(b) of the CJA confers jurisdiction on this court to hear this petition.

[39] It is also evident to me from the facility agreement that the respondent's factory as well as its assets and machinery are situated in Kuching. In the event a winding up is ordered, it is by the court here and the DGFs branch office here which will be better placed to provide the close supervision required on the winding up of the respondent. The respondent has not made any attempt to disclose what, if any, assets or other properties it owns in West Malaysia which would make it more

practical and convenient for the winding up court and branch office of the DGI's office there to supervise, in the event an order of winding up is made.

SHOULD SERVICE BE SET ASIDE?

[40] The amended petition was re-served on the respondent at its business address at Lot 1198, Block 12, Samajaya Free Industrial Zone, Jalan Muara Tabuan, 93450 Kuching. In the Facility Agreement this address is described as its business address. Service was effected at that address by leaving a copy of the amended petition with an officer of the company, namely, Madam Chak Lee Yee, a director of the respondent. Such service was effected on 24 May 2005.

[41] The respondent has now come forward to set aside the service on it of the amended petition on the ground that service was not effected on it at its registered office as required by r 25(1) of the Rules. According to the respondent it is only if it does not have a registered office that service may be effected on it at its business address. Rule 25 of the Rules states:

> Every petition shall, unless presented by the company, be served upon the company at the registered office of the company, and if there is no registered office, then at the principal or last known principal place of business of the company, if can be found, by leaving a copy with any member, officer, or servant of the company there, or in case no such member, officer, or servant can be found there, then by leaving a copy at the registered office or principal place of business, or by serving it on such member or members of the company as the court may direct; and where the company is being wound up voluntarily, the petition shall also be served upon the liquidator (if any) appointed for the purpose of winding up of the affairs of the company. The affidavit of service of the petition may be in Form 5 or 6.

[42] Since the respondent does have a registered office, I do not think it can be denied by Bank Industri that in effecting service of the amended petition on the respondent at its business address instead of at its registered address, there has been non-compliance with r 25(1) of the Rules which gives rise to an irregularity regarding service. But the crucial question that must be asked is this:

[43] What is the effect of such non-compliance or irregularity? Ms Tham of counsel for the respondent submitted that winding up is a draconian remedy as it seeks to terminate the existence of a company against the will or wishes of its officers, staff and members. Accordingly, she submits that the winding up Rules must be adhered to strictly, as any non-compliance with the rules of service would work an injustice.

[44] In my judgment to decide the issue at hand, useful reference may be made to r 194 of the Rules which states that:

> No proceeding under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the court is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the court.

[45] So what substantial injustice was caused to the respondent by being served the amended petition at its business address and not its registered address? I do not think there has been any. In the first place, it has been said that the object of service of process is to bring the proceedings to the notice of the person being served and whatever mode is used, there must be a reasonable probability that this object will be achieved. In the *Malaysian High Court Practice* 2001 Desk Edition there appears this commentary about service at p 2024:

> The whole purpose of servicing a writ and statement is to make a defendant aware of the fact that legal proceedings have been commenced against him and that he is entitled within the time limited in the writ, to enter an appearance and make his defence but in default of him doing so, the plaintiff may proceed to enter judgment and levy execution against him…. It seems that the courts are inclined to interpret the rule liberally. Once it is proved that the defendant was aware of the proceedings against him, the court will recognise service of documents as such is within the methods prescribed by the rules.

[46] In my view what was stated there is no less applicable in the case of service under the winding up rules.

[47] In the second place, this is not a case where a winding up order has resulted from service which did not strictly comply with the rules (as was the case in *MUI Bank Bhd v Golden Hornbill Hotel Sdn Bhd* [1993] 1 MLJ 290 where Chong Siew Fai J, (as he then was) set aside a winding up order made for want of good service). Here the respondent was well aware of these proceedings, and has applied to set aside the order of substitution.

[48] Accordingly, I find this a suitable case to apply r 194 of the rules by curing the irregularity by an appropriate order regarding costs. In doing so I associate myself with what was expressed by Abdul Wahab Patail J, in *Ann Joo Metal Sdn Bhd v Pembenaan MY Chahaya Sdn Bhd* [2000] 5 MLJ 709at p 715, where the learned judge said:

> In my view the provisions as to service at the registered office cannot be intended as a shield for a company to plead that service was not made to its registered address as a defence when in fact it has received the notice and petition, and has not shown any prejudice in its defence not being served at its registered office.

[49] In the result, I dismiss the respondent's application to set aside the order of substitution (in encl 68) with costs. I also dismiss the respondent's application to set aside service of the amended petition (in encl 101) but order that each party is to bear its own costs.

Respondent's applications dismissed.

Reported by Loo Lai Mee